IN THE COUNTY COURT OF VICTORIA
AT MELBOURNE
CRIMINAL JURISDICTION

Revised
Not Restricted
Suitable for Publication

CR-22-01665
M10705100

DIRECTOR OF PUBLIC PROSECUTIONS

v

TUO DONG

JUDGE:	HIS HONOUR JUDGE DOYLE
WHERE HELD:	Melbourne
DATE OF HEARING:	1 June 2023
DATE OF SENTENCE:	7 June 2023
CASE MAY BE CITED AS:	DPP v Dong
MEDIUM NEUTRAL CITATION:	[2023] VCC 1040

REASONS FOR SENTENCE

Subject:	Criminal Law - Sentence
Catchwords:	Guilty plea – Five charges of obtaining a financial advantage by deception – Sentence indication - Continuing criminal enterprise
Legislation Cited:	*Crimes Act* 1958 (Vic), s 82(1); *Sentencing Act* 1991

Cases Cited:	*DPP v Akkala* [2020] VCC 120 (19 February 2020); *DPP v Bulfin* [1998] 4 VR 114; *Hicks v The Queen* [2016] VSCA 162; *R v Arundell* [2003] VSCA 69; *Shiel v The Queen* [2017] VSCA 359; *Tran v The Queen* [2014] VSCA 85; *Worboyes v The Queen* [2021] VSCA 169.
Sentence:	8 months imprisonment with a 18 month community correction order upon release
s6AAA declaration:	Total effective sentence of 3 years, with a minimum 18 months.

APPEARANCES:	Counsel	Solicitors
For the Director of Public Prosecutions	Mr P. Pickering	Solicitor for the Office of Public Prosecutions
For the Accused	Mr P. Tehan KC with Mr S. Kelly	Patten Robins Lawyers Pty Ltd

HIS HONOUR:

1 Tuo Dong, you have pleaded guilty to five charges of obtaining a financial advantage by deception. You pleaded guilty after a sentence indication hearing, where the indication I gave was that there would be a period of immediate imprisonment. The maximum penalty for obtain a financial advantage by deception is ten years' imprisonment. However, as you have been found guilty of five continuing criminal enterprise offences where the value in each charge is over $50,000, you are a continuing criminal enterprise offender for all charges. Therefore, the maximum penalty for all offences on the indictment is twenty years, which is twice the maximum term prescribed.

Background of the offending

2 You are 33-years old. At the time of the offending, you were 26-years old and then 27-years old. You were living at Grandview Grove in Oakleigh. You were employed as the CEO of Blueways Group Pty Ltd ("Blueways"), a property development company, at the time of offending. The co-offenders are Shanshan Mao, who had been employed by ANZ Banking Group as a loans manager, and her partner Shaojing Niu.

3 In 2018, the ANZ Bank commenced an investigation into Mao and Niu's loan activities, in particular their applications to purchase properties in Parer Street, Burwood in September 2015 and Mora Avenue Oakleigh in October 2017.

4 As part of the ANZ investigation, Ms Jennifer Banks reviewed payslips issued by Blueways to Mr Niu confirming his asserted income. You provided the payslips to Mr Niu and Ms Mao in support of the loan applications. The banks believed such payslips were accurate when they granted the loans.

5 Police investigators obtained the full gamut of loan applications made by Ms Mao and Mr Niu, five of which were supported by the false Blueways payslips you provided.

6 On 7 April 2016, Ms Mao and Mr Niu applied to the NAB as guarantors of Keke Asset Holdings for a loan of $2,000,000. The loan was for refinancing of an ANZ loan and for the construction of an additional unit at South Road, Brighton East.

7 The co-offenders obtained the loan from ANZ for purchase of the South Road property. The application was signed by both Ms Mao and Mr Niu, and falsely that Mr Niu was employed by Blueways since 20 August 2015, and his gross salary was $185,000 per annum. The application was supported by three payslips from Blueways. The refinancing was approved and 1.2 million was drawn down on 3 August 2016. You, Mr Dong, had provided the templates for the false payslips. This is the basis of Charge 1.

8 On 27 October 2016, Mao and Niu applied for a loan for a construction of a further unit at the South Road property. The application was signed by both Mao and Niu, and falsely represented that Niu was employed by Blueways, in the same terms as the previous payslips for Charge 1. This application was to the NAB. There were other payslips from Blueways from 1 September 2016 and 31 October 2016. The loan provided was $532,820.55. Again, the templates for the payslips had been provided by you to Mr Niu. This is the basis of Charge 2.

9 On 3 July 2017, Mao and Niu applied for a home loan to Westpac for the purchase of a property at Faulkiner Street, Clayton. The application to Westpac was signed by them and falsely stated that Mr Niu was employed by Blueways since 1 January 2015, and his gross salary was $183,000 per annum. The application again was supported by Blueways payslips. You had provided the templates. The loan was for $1,096,000, and it was drawn down on 1 September 2017. This is the basis of Charge 3.

10 On 16 October 2017, Mao and Niu signed an application for a home loan from the ANZ, for the purchase of a property at Mora Avenue, Oakleigh. The application falsely represented that Mr Niu was employed by Blueways and that his monthly gross salary was $15,416.67. The application was supported by two

payslips from Blueways Group, from 1 August 2017 and 2 October 2017. The home loan was for $1,033,000. It was drawn down on 20 October 2017. You provided the templates for the payslips on that occasion. That is the basis of Charge 4.

11 On the last occasion on 9 January 2018, Ms Mao and Mr Niu applied to the NAB for a loan refinance and construction of a property at Draper Street, Ormond. It was signed by them and supported by a letter purportedly signed by you stating that:

(a) Niu will be back to Blueways as Finance and Business Development Manager from 5 February 2018; and

(b) Niu's gross salary 'will remain at $185,000 plus super per annum'.

12 The home loan of $2,038,504.96 was drawn down by Mao and Niu on 7 February 2018. The contents of the letter were false. This is the basis of Charge 5.

13 Mr Niu was arrested on 6 December 2019. In his record of interview, he described your involvement and on 11 December 2019, he made a statement to police in which he said:

(a) you and he met and became friends in 2014;

(b) you encouraged his involvement in property development in 2015;

(c) he had trouble getting a mortgage loan approved by the banks without any payslips to prove income in Australian, so he discussed with you this issue and you offered to help him;

(d) you said, 'Just find a couple of payslips then you will get the approved'. Niu replied, 'Could you help?' And you said, 'Yes'.

(e) you asked how much you should put on the payslip and Niu said, 'The more the better';

(f) you were supportive and willing to help Niu in his property development project.

14 Subsequent police investigations located emails from you to Mr Niu containing a fraudulent employment letter which you had signed.

15 Mr Niu was cross-examined at the committal proceeding in relation to your charges and stood by the account he gave in the statement.

16 Ms Mao was arrested and interviewed on 16 December 2019. She denied knowledge or knowing that the applications were fraudulent, but she ultimately plead guilty to her participation in these frauds.

17 You were arrested at home in Oakleigh on 26 February 2020. Police seized devices containing emails and text messages between you and Mr Niu. As I said earlier, they located the emails from you to Mr Niu providing payslips and employment letters. You made a 'no comment' record of interview.

18 The filing hearing in this case took place on 26 April 2021 and the contested committal proceeded on 12 September 2022. On 20 February this year following a sentence indication hearing held on 19 January, you indicated you would plead guilty to the five charges on the indictment, which you did on 8 March of this year. The plea was then adjourned until last week on 1 June.

19 Mr Tehan KC on your behalf submitted that the plea should be assessed as being at an early opportunity notwithstanding that you ran a contested committal. He pointed to some disclosure issues between your lawyers and the prosecution that needed to be sorted out. Now as you did run a contested committal and cross-examine Mr Niu I would not characterise your plea as being indicated at an early opportunity, but nor was it a late plea.

20 This case was never listed for trial. The court did not have to allocate valuable court time to what would have been a complex and probably lengthy trial. That never happened. I accept your guilty plea indicates remorse and a willingness to facilitate the course of justice.

21 The utilitarian value of your plea is significant. You have spared the court and the prosecution the time and resources required for a trial. The principles espoused in the case of *Worboyes*[1] apply. You must receive a palpable amelioration of sentence for your plea.

Gravity

22 I turn to the sentencing principles and the seriousness of this offence. This type of offending as I said at the outset, carries a maximum penalty of 20 years because the offences are continuing criminal enterprise offences, which doubles the statutory maximum penalty. This reflects the seriousness of the offending.

23 Issues relating to sentencing in cases involving continuing criminal enterprise offences have been considered by the Court of Appeal in the case of *R v Arundell*,[2] Vincent JA said this of the continuing criminal enterprise provisions:

24 Parliament has, through the enactment of Part 2B, expressed an intention to deter those who demonstrate preparedness to engage in repeated predatory behaviour, affecting through the commission of offences of the kind presently under consideration, the economic welfare of individual victims and the general community.[3]

25 However, in *Shiel v The Queen*,[4] the Court of Appeal said that the higher maximum penalty:

> Should not be automatically increased by virtue of there being a greater maximum penalty for that offence. Where a sentencing judge increases an individual sentence imposed on the continuing criminal enterprise offence, he or she must explain the basis of doing so.[5]

[1] *Worboyes v The Queen* [2021] VSCA 169
[2] [2003] VSCA 69.
[3] Ibid, 22.
[4] [2017] VSCA 359
[5] Ibid, 41.

26 The relevant principles for offending, such as yours, are encapsulated in the following passage from the judgment of Charles JA in the case of *Bulfin*[6] where he said:

> Whatever the motivation, offences of the kind here in question almost invariably involve a carefully calculated course of conduct over a long period, repeated deliberate acts of dishonesty, substantial amounts of money and frequently losses (often tragic in their impact) to large numbers of small investors. The offender often holds a position making it possible, or has the ability, to disguise or camouflage the conduct in question. Detection is difficult, the investigation of the crime usually lengthy and very expensive, and the problems of trial and proof will frequently be extreme. ... The result of such considerations, in my view, is that the element of general deterrence will usually carry particular significance in sentencing for crimes such as the present…. together with the requirement for strong denunciation by the sentencing court.[7]

27 Your offending involves some of the features identified in *Bulfin.* For instance, it was protracted, occurring from April 2016 to 9 January 2018. It involved some organisation and planning. And it was a course of conduct involving repeated acts of dishonesty. The quantum of the total financial advantage obtained by your co-offenders, with your assistance, was $5,900,333.51. That is a very large amount.

28 Mr Tehan, on your behalf, submitted that the quantum in home loan matters, is by necessity, always going to be in the millions but in this case, I should focus on the fact that there was no loss to the banks, which is true and that was a mitigating factor in sentencing the co-offenders, Ms Mao and Mr Niu. Nonetheless, the foundation of the home loan system is the accuracy of the loan application, so the lender can accurately assess the risk of the loan and make an appropriate decision whether to lend. Deprived of that information, the act of loaning the money carries a very substantial risk of loss to the lender. Offending such as this does undermine the integrity of the home loan system.

29 Of course, you were not a principal offender in this case. Ms Mao and Mr Nguyen had already commenced offending when you became involved. The scheme was up and running. They had committed two substantial deceptions

[6] *DPP v Bulfin* [1998] 4 VR 114.
[7] Ibid, 132.

involving false loan applications which included false payslips, or purported payslips from another source. They knew what they were doing. They also faced more charges because they were involved in a greater number of deceptions. The quantum of their offending was higher. They were the beneficiaries of this offending. Their lucrative property development endeavours were based on the money they fraudulently obtained.

30 You did not receive the benefit. For these reasons your moral culpability is significantly lower than the offenders. Mr Nguyen had been your mortgage broker. He had a business economics degree. He approves the bought and sold properties in New Zealand before coming to Australia. Ms Mao worked at a bank in loan approvals. She had been your banker. They were older, more experienced. You were 26 and then 27 years old at the time of the offending.

31 I do not accept that part of Mr Nguyen's statement which suggests that you were the originator of the idea of false payslips. However, I do accept that your conduct was integral to the five deceptions in which you were involved.

32 I must apply parity in this case. And given the differences that I have described, your sentences will be significantly lower than the sentence that I imposed on Ms Mao and Mr Nguyen.

33 Mr Tehan described the offending as occurring when Mao and Nguyen hit a snag in getting loan approvals and they came to you for assistance and you were prepared to become involved. Having regard to the psychological material, I accept that there is an element of truth to your motivation being to seek acceptance from them.

34 Mr Pickering submitted, and I accept, you were integral to the offending because whilst there was an established pattern, they had reached a certain point and they could not obtain anymore loans without your assistance. And that your conduct facilitated further offending. Whatever your motivation was, you were willing to become involved in this deliberate and serious dishonesty offending.

Personal circumstances

35 Your personal circumstances were outlined in the psychological report of Dr Sullivan, in a letter from your counsellor, Mr McInnes, and in the defence outline of sentence indication submissions.

36 You were born in Harbin, China, in September 1989. You are now 33 years old. Your father was an electrical engineer and your mother was a civil engineer for a Chinese government land development agency. You have one brother who is eight years junior to you, who lives with your mother.

37 Your family migrated to Perth when you were five years old and then moved to Sydney two years later. Your father obtained employment as an electrical engineer and in 1999, your family moved to Melbourne. You have indicated your father was a heavy drinker and he was physically and verbally abusive to you and your mother.

38 He returned to China in 2001 where he now works and he returns to visit Australia from time to time. You say that he did not make child support payments and your mother, who did not speak English, relied on benefits and otherwise low paying jobs to raise you and your sibling.

39 You attended some eight different schools and you say you were bullied for your appearance and ethnicity which led to behavioural issues. You were expelled from Wheelers Hill Secondary College and later Mazenod College. You completed year 10 at Oakleigh South Secondary College before completing VCE at Salesian College where you reported feeling happier and having friends.

40 Between the ages of 14 and 16, you used drugs and alcohol excessively. Notwithstanding these difficulties in your teenage years, you achieved an ATAR of over 90 and obtained a scholarship to attend Monash University.

41 You enrolled in a Bachelor of Accounting and Marketing. Whilst studying, you worked at an accounting firm. You left after two years and struggled then with various business pursuits including product sales and real estate. You did not

complete your degree. In 2011 you worked for a roofing company in sales. In that employment you met Mr Nguyen.

42 In 2015 you became the CEO of Blueways, a property development company funded by a businessman from China that your family had met through a student from China who had lived with you. Your mother was on the board and assisted in managing investments. It was in that context that you committed these offences.

43 It is relevant to assessing the gravity of the offences that you held a senior position at Blueways, and you used that position to offend. However, since you were detected for this offending, you lost your employment and you are currently unemployed. You met your partner, Melissa, in 2018. You married in 2020 and have a six-month-old daughter named Chloe. Melissa works as an operations manager in information technology and in other businesses.

44 As to your psychological situation, you have reported long standing mood difficulties including suicidal thoughts since you were a young teenager. You have also struggled with compulsive eating and it is described that you are currently overweight.

45 The material describes an attempted suicide when you were 30-years old. In 2021 you were diagnosed with ADHD by a Dr Lim, a consultant psychiatrist. You were prescribed Ritalin but did not renew your prescription because it increased your anxiety. You are reluctant to take medication.

46 Dr Danny Sullivan, who provided a report, confirms the diagnosis of ADHD. Your counsellor, Robert McInnes, provided a letter which confirms you have been attending sessions with him since 21 September 2019. He said that your mental health has been affected significantly by these proceedings. You have lost your CEO position and your wealth, including your home, and you have been unable to find new employment.

47 Mr McInnes says this:

> His greater core belief is that he can get acceptance from others by helping them to become successful financially. This core belief is held at an intense level. He suffers from depression and anxiety and uses helping others as a tool to cope.

48 Also, I received a letter from Franco Greco, a psychologist who you have been seeing since May 2021 for treatment.

49 At 33 years old, you are not a young offender, but these offences were committed when you were 26 and 27. Your age, psychological disposition, in that you seek acceptance from others by seeking to help them, viewed against your unsettled upbringing involving paternal abandonment are all matters relevant to assessing your moral culpability that justify some reduction in that assessment.

50 Dr Sullivan says in his report that, having regard to your psychological conditions, you will find imprisonment more burdensome than someone without such conditions; and I have taken that into account in mitigation in this matter. I have had regard to all of the character references which were tendered on the plea. Some of the authors of those documents attended the plea to support you.

Character references

51 Mr Han Fengling, an Associate Professor at RMIT who has known you since you were 13-years old, describes you as kind and generous. In his experience of you, he says you are a good and honest person, willing to assist anyone in need. He describes you as the backbone of your family, and a devoted husband and father.

52 Dr Aimin Yu from Swinburne University who invested in the property company of which you were the CEO describes you as kind-hearted and honourable. Ms Gina Dong describes you as sincere, generous, and highly regarded in your community. She describes the impact of these proceedings on you.

53 Mr Michael Tiemens, who attended the plea via Webex says you have supported him through challenging times over the course of your eight-year friendship, and that you are a genuine person with a strong work ethic, who would not deliberately harm or deceive anyone. I received another reference from Mr Minh Nguyen, who is a friend of yours and speaks of your dependable, honest, and generous nature.

54 Finally, your wife, Melissa, has provided a reference dated 6 June 2023. She details how this offending has impacted your mental health. She confirms, as do many of the other references, the importance to you of giving back to the community and helping others. She describes her grief in knowing you will miss many of Chloe's milestones while in prison, and she says you have expressed remorse for this offending.

55 I take all these matters into account as establishing good character. Of course, the authorities are clear that good character has less weight in offending such as this, because it is good character that allows the offending to occur. Nonetheless, your good character is relevant in my view to an assessment of your prospects of rehabilitation, and also to the need for specific deterrence, and more generally, relevant in assessing your personal circumstances.

Delay

56 The offending was first detected in October 2018, and the investigation commenced in February 2019. The interviews of your co-offenders did not take place until December 2019. You were interviewed on 26 February 2020, and the charges were not issued until 6 April 2021.

57 It is not uncommon for cases such as yours to have delay due to the complexities in the investigation. However, the delay between the detection and your interview, and the charges being laid, and the ultimate resolution of this matter has been considerable, and it is not attributable to you.

58 There have been some issues with disclosure, as indicated by bundles of correspondence handed up on the plea, and there had been delays caused by the disruption to the court system of the pandemic. In the case of *Hicks v The Queen*[8], which involved deceptions, which proceeded to trial, the delay was six years between arrest and sentence. Priest JA summarised the impact of delay on sentencing as including the impact on you of having these matters hanging over your head for an extended period of time, and that delay gives the sentencing judge an opportunity to assess your rehabilitation over that extended period. There has been no further offending by you, and I am satisfied there has been on-going rehabilitation as referred to in the material before me.

59 Additionally, the period you have had to wait for the resolution of this matter, knowing a period in prison was likely, has taken a significant toll on you. I have taken delay into account as a significant mitigating factor.

60 You lost your home, your job, and as a result of these proceedings, you will be banned as a director of any companies for a period of five years. Your detection in this offending will have a significant impact on the career that you were pursuing at the time. I have taken into account those impacts as extra curial punishment.

61 Additionally, Mr Tehan told me and I accept that your wife, Melissa, has experienced post-partum complications, including breastfeeding, and psychological issues, and that your daughter, Chloe, is currently underweight. Your wife, Melissa, is clearly distraught at the prospect of your incarceration. That was clear from her reference and her presentation in court. I am satisfied that your personal circumstances, including the impact on your wife and your mother, mean that imprisonment will weigh heavily on you, and I have taken that into account in deciding the sentence.

[8] [2016] VSCA 162

Prospects of rehabilitation

62 You have no criminal history. You have a strong work history, you have not re-offended since being detected for this offending, you have a strong family and on-going support, you have been seeing Mr Greco and Mr McInnes for several years now. In all the circumstances of this case, in my opinion, you have very good prospects of rehabilitation, and that part of the sentence, which involves a community correction order, will further facilitate your rehabilitation through conditions, including conditions which address your mental health issues.

63 I have had regard to the cases discussed on the plea by both the defence and the prosecution, including the case of *Tran v The Queen*[9] and the county court sentence of the *DPP v Akkala*[10], which was a decision of Judge Wilmoth. I considered both of those cases when sentencing the co-offenders in this matter. Current sentencing practices are of course a guide, but not a controlling factor in deciding the sentence. They are one of the many matters I must have regard in exercising the sentencing discretion.

Submissions

64 Mr Tehan in this matter initially submitted that a community correction order was appropriate for this offending, but after my sentence indication, the focus of his submissions was that I should impose a combination sentence, with a short period of imprisonment, or as he put it, the shortest period possible.

65 Prosecutor, Mr Pickering, submitted that you had a full awareness of the consequences, and that the offending was not just a once-off. He pointed out to me that the Court of Appeal characterised my sentence on your co-offenders as lenient. He said nothing had changed from the sentence indication; I should not deviate from it.

66 In sentencing you, I have had regard to the objective gravity of the offending and the need for general deterrence and denunciation. Specific deterrence had some relevance but is reduced significantly by my positive assessment of your

9 [2014] VSCA 85.
10 [2020] VCC 120 (19 February 2020).

prospects of rehabilitation. I am satisfied that the period that I will impose that you will have to serve in prison is sufficient to satisfy the needs of specific deterrence.

67 I must also seek to facilitate your rehabilitation, and I have done that by imposing a community correction order in this matter at the conclusion of the period of imprisonment I will now order.

68 I have deviated marginally from the period of imprisonment I indicated.

Sentence

69 Mr Dong, for all charges, you are sentenced to a period of imprisonment of 8 months, to be then released upon a community correction order for a period of 18 months.

70 You will be under the supervision of Community Corrections for a period of 18 months. I order 160 hours of unpaid community work. You will have to undergo any mental health assessment and treatment as directed. I order that 30 hours of any time spent on programmed conditions can be deducted from the community work that I have imposed.

71 There are core conditions of every community correction order. You must not commit another offence punishable by imprisonment for the period of the order. If you do, you will be charged with breaching the order. You would have to come back to court and one of the options is that I would re-sentence you for these charges.

72 You have to comply with any lawful directions from Corrections. If you change your address, you must tell Corrections. If you are employed and you change your job, you must tell Corrections. You cannot leave Victoria without informing Corrections and you must obey all of their lawful instructions and directions.

73 There are some other obligations to comply with, the regulations, but I will get Mr Kelly to explain those to you. Do you consent to a community correction

order in the terms that I have outlined? Yes. All right, well we will have that order sent through, and that can be signed in the prison.

74 I allow six days pre-sentence detention pursuant to s 18 of the *Sentencing Act* 1991. Pursuant to s 6AAA of the *Sentencing Act* 1991, I indicate that were it not for the plea of guilty, I would have imposed a total effective sentence of 3 years, with a minimum 18 months.

75 Pursuant to s 6H(1)(3) of the *Sentencing Act* 1991, I declare that you are a continuing criminal enterprise offender for all charges, and that will be entered into the records for the court. Nothing else I need to do, Mr Pickering?

76 MR PICKERING: No, Your Honour.

77 HIS HONOUR: All right. Those are the orders that I will make. I will sign the community correction order and it'll be sent through for Mr Dong to sign. That means you have to serve eight months, minus the six days' pre-sentence detention, Mr Dong, and then you will be released on a community correction order for a period of 18 months. All right, do you understand the order? All right, thank you.

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